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No. 96-1818

In The

Supreme Court of the United States

October Term, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

MAINE RIGHT TO LIFE COMMITTEE, INC., AND HUGH T. CORBETT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE RIGHT TO LIFE COMMITTEE AND HUGH T. CORBETT

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QUESTION PRESENTED FOR REVIEW

1. Whether the regulation at 11 C.F.R. § 100.22(b) defining the phrase "express advocacy" is beyond the statutory authority of the Federal Election Commission under 2 U.S.C. § 441b as that provision has been construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) and therefore, void under the Administrative Procedure Act, 5 U.S.C. § 706.

LIST OF PARTIES AND DISCLOSURE STATEMENT

Respondent Maine Right to Life Committee, Inc. (MRLC) is a nonprofit corporation organized under Maine law. MRLC has neither parent companies nor subsidiaries. Hugh T. Corbett is an individual and not a member of MRLC.

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BRIEF IN OPPOSITION FOR RESPONDENTS MAINE RIGHT TO LIFE COMMITTEE AND HUGH T. CORBETT

The Respondents respectfully request that this Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on October 18, 1996.

STATEMENT OF THE CASE

This case concerns the validity of 11 C.F.R. § 100.22(b), a regulation adopted by the Federal Election Commission to define the term "expressly advocating" for the purposes of the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA). The court of appeals held that the regulation exceeds the authority of the Federal Election Commission (FEC) under 2 U.S.C. § 441b as that provision has been construed by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (*Buckley*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (*MCFL*) and is, therefore, invalid. The FEC filed its Petition for a Writ of Certiorari, which Respondents now oppose.

I. THE FEC'S REGULATION AT 11 C.F.R. § 100.22(b) IS MUCH BROADER THAN PERMITTED UNDER THIS COURT'S SPEECH-PROTECTIVE FIRST AMENDMENT PRECEDENTS.

A. The "express advocacy" test, the narrowing construction placed on 2 U.S.C. § 441b by this Court under *MCFL* and *Buckley*, defines the outer limit of governmental regulation of political speech under the First Amendment.

FECA places various restrictions on disbursements for communications made in connection with federal elections. For example, FECA makes it "unlawful . . . for

any corporation . . . to make a contribution or expenditure in connection with any [federal] election. . . . " 2 U.S.C. § 441b. For the purposes of 2 U.S.C. § 441b, the phrase "contribution or expenditure" is defined to

> include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate . . . in connection with any election to any [federal] office. . . . "

2 U.S.C. § 441b(b)(2). Recognizing that § 441b's prohibition on corporate expenditures has the potential to restrict speech protected by the First Amendment, this Court limited the reach of that provision, "hold[ing] that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. In so holding, this Court incorporated by reference the "express advocacy" test it had previously developed in *Buckley*. Under *Buckley's* test, a communication constitutes express advocacy only if it includes "*explicit words of advocacy* of election or defeat of a candidate. . . . " 424 U.S. at 43 (emphasis added).

B. The FEC's definition of "expressly advocating" is broader than this Court's definition of that term and thus exceeds the authority of the FEC under 2 U.S.C. § 441b.

1. The regulation at 11 C.F.R. § 100.22.

Petitioner FEC promulgated a regulation at 11 C.F.R. § 100.22, which purported to define the term "expressly advocating." The regulation, which became effective on October 5, 1995, defines "[e]xpressly advocating" as

> any communication that –
>
> (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support

> the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94" "vote Pro-life" or "vote Pro-choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76" "Reagan/Bush" or "Mondale!"; or
>
> (b) when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. As will be shown, subpart (b) of 11 C.F.R. § 100.22 encompasses speech which this Court has placed beyond the reach of governmental regulation.

2. The instant lawsuit.

Recognizing that subpart (b) of the above-quoted regulation encompassed speech which is protected by the First Amendment under the *Buckley* definition of "express

advocacy," Respondent Maine Right to Life Committee (MRLC) a non-profit corporation domiciled in Maine filed the instant action under the Administrative Procedure Act, specifically, 5 U.S.C. § 706. MRLC's principal claim was that the second portion of the regulation (11 C.F.R. § 100.22(b)) exceeds the authority of the FEC under 2 U.S.C. § 441b (FECA's prohibition of corporate expenditures) as that section had been construed by this Court in *MCFL*. Although the regulation had not been enforced, MRLC feared that the FEC would enforce it. Therefore, MRLC, a corporation which routinely engages in the public discussion of issues, brought this lawsuit against the FEC's regulation rather than censor its own speech. Respondent Hugh T. Corbett joined in the action, contending that the chilling effect of the regulation on MRLC's speech would inhibit the exercise of his First Amendment right to receive information from MRLC. *See Amended Verified Complaint*; Petitioner's Appendices (Pet. App.) at 19.

The district court held that "the regulation found in 11 C.F.R. § 100.22(b) is invalid as not authorized by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as interpreted by the United States Supreme Court in *Massachusetts Citizens for Life. . . . " Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F.Supp. 8, 13 (D.Me. 1996); Pet. App. at 3. The court of appeals "affirm[ed] for substantially the reasons set forth in the district court opinion." 98 F.3d 1 (1st Cir. 1996); Pet. App. at 1.

3. This Court's development of the "express advocacy" test in *Buckley*.

In *Buckley*, this Court recognized that certain provisions of FECA inhibit the exercise of protected political speech. For example, in considering the constitutionality

of the provision then contained in 2 U.S.C. § 434(e) (which required disclosure of campaign-related contributions and expenditures by persons other than political committees), this Court stated that the provision

> raises serious problems of vagueness particularly treacherous where . . . the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

Buckley, 424 U.S. at 76-77. Section 434(e) required

> '[e]very person . . . who makes contributions or expenditures' aggregating over [a certain threshold] in a calendar year . . . to file a statement with the Commission.

Id. at 74-75. As this Court noted,

> '[c]ontributions' and 'expenditures' are defined in parallel provisions in terms of the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal office.

Id. at 77. This Court explained that "it is the ambiguity of this phrase [for the purpose of . . . influencing] that poses constitutional problems." *Id.* That phrase was constitutionally infirm because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Therefore, in order to "insure that the reach of § 434(e) is not impermissibly broad," this Court narrowly construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

In a footnote to the term "expressly advocate" in the last-quoted passage, this Court referred to an earlier footnote in *Buckley* (424 U.S. at 44 n.52) in which it had defined "express advocacy" for the purpose of narrowly

construing a different provision of FECA. *Id.* at 80 n.108. There this Court explained that the section of FECA which placed a $1,000 annual ceiling on expenditure[s] . . . relative to a clearly identified candidate" must be

> restrict[ed] . . . to communications containing *express words of advocacy* of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'

424 U.S. at 44 n.52 (emphasis added).

The *Buckley* Court referred to this constitutionally-required narrowing construction (which has become known as the "express advocacy test") repeatedly throughout the opinion. In no fewer than eight separate references,[1] this Court made clear that the "express advocacy test" was a "narrow[ ] and explicit[ ] constru[ction]" of FECA, *id.* at 44, which reached only communications which include "explicit words of advocacy" or communications which "in express terms advocate the election or defeat of a clearly identified candidate for federal

---

[1] This Court described the "express advocacy" test in the following words: (1) "explicit words of advocacy," *Buckley*, 424 U.S. at 43; (2) "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; (3) "communications containing express words of advocacy of election or defeat," *id.* n.52; (4) "expenditures that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 45; (5) "express advocacy of election or defeat," *id.*; (6) "funds for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80; (7) "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.*; and (8) "expenditures that expressly advocate a particular election result," *id.*

office."[2] *Id.* at 43-44. This Court further characterized the "express advocacy" test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness. . . . " *Id.* at 45. In this regard, it is noteworthy that the court of appeals in *Buckley* had attempted to deal with the perceived vagueness of 18 U.S.C. 608(e)(1) by reading the phrase " 'relative to' a candidate to be read to mean 'advocating the election or defeat of a candidate.' " 424 U.S. at 42. However, this Court held that "the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether." *Id.* Thus, this Court insisted that mere "advocacy" was not enough to bring a communication within the purview of the statutory limitation; rather, the communication must contain "explicit words of advocacy." *Id.* at 43.

There is a pragmatic reason why the express advocacy test must be narrow and explicit. It is because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. This follows from the fact that

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. The close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed

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[2] "Express" is defined to mean "clear, definite, explicit. . . . " BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Thus, "express" and "explicit" are synonymous.

in a position of doubt, not knowing whether to censor his own speech. As *Buckley* explained,

> [n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). In order to avoid the "constitutional deficiencies" described in the foregoing quotation (*i.e.*, vagueness and overbreadth leading to self-censorship), *Buckley* held that the statutory expenditure limitations must be "limited to communications that include *explicit words of advocacy* of election or defeat of a candidate." 424 U.S. at 43 (emphasis added).

In sum, "[s]o long as persons and groups eschew expenditures that in *express* terms advocate the election of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45. Under the *Buckley* definition of "express advocacy," then, disbursements for political purposes are accorded full First Amendment protection as long as they remain outside the narrowly-circumscribed category of "express advocacy."

4. The policies animating this Court's development of the "express advocacy" test.

This Court developed the "express advocacy" test specifically to implement the central purpose of the First Amendment: the protection of political speech from governmental infringement and concomitant self-censorship. This Court has stated that the purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This principle has particular relevance in the field of election law, because such laws by their very nature seek to limit the amount of money spent in connection with campaigns. *See, e.g.*, 2 U.S.C. § 441b. As this Court has explained,

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley, 424 U.S. at 18-19. Thus, the *sine qua non* of robust political discourse is the ability to spend money for political communications. Therefore, while acknowledging that Congress has the general constitutional power to regulate elections for federal office, *id.* at 13, this Court has recognized that the regulation of the election process is fraught with peril to First Amendment freedom of speech. As this Court stated, "[t]he Act's contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added).

As this Court further explained in *Buckley*, there is no doubt that the framers of the First Amendment specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of

governmental affairs." 424 U.S. at 14, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966). The reason for the protection of political speech was the framers' understanding that it is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. This Court stated that,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. Or, as this Court stated elsewhere in the opinion, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

The protection of political speech is not unique to *Buckley* and its progeny, but has a long provenance in this Court's case law. As this Court stated in *New York Times*, "that freedom of expression on public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269. Indeed, "public discussion" is not only a political right, it "is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931). Thus, this Court has been solicitous to protect political speech not only as a matter of individual liberty, and not only because such was the intention of the First Amendment's framers, but because such speech is crucial to the survival of our representative government and its system of ordered liberty. This principle, in turn, presupposes that First Amendment protection of political speech – necessary for the very survival of self-government – is,

therefore, the precondition of all other freedoms protected by the Constitution.

Adhering to this Court's First Amendment jurisprudence, the *Buckley* Court rooted its First Amendment analysis in the purpose of protecting the institutions of democracy. Therefore, it is evident that this Court in *Buckley* was avid to protect political speech against infringement under FECA. In particular, this Court wished to protect a species of political speech – *issue advocacy* – from regulation. As has been explained above, this Court did so through the development of the "express advocacy" test.

5. *MCFL's* application of the "express advocacy" test to § 441b.

In *MCFL*, this Court unanimously held that 2 U.S.C. § 441b prohibited only those corporate communications which consisted of "express advocacy." *MCFL* concerned, *inter alia*, the question of whether a voter guide published by a nonprofit, ideological corporation constituted "express advocacy." The defendant in *MCFL* had contended that, like the disclosure provisions of 2 U.S.C. § 434(e) at issue in *Buckley*, 2 U.S.C. § 441b (the "more intrusive provision that directly regulates independent spending") demanded a narrowing construction in order to comply with the requirements of the First Amendment. *MCFL*, 479 U.S. at 248-49. This Court agreed, holding "that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 497 U.S. at 249. In so holding, the *MCFL* Court relied on the same fundamental rationale which animated *Buckley*, *i.e.*, that *issue advocacy* must be protected:

> *Buckley* adopted the "express advocacy" requirement to distinguish *discussion of issues* from more pointed exhortations to vote for particular

> persons. We therefore concluded in that case that a finding of "express advocacy" *depended upon the use of language such as "vote for," "elect," "support," etc.*

497 U.S. at 249 (emphasis added). Thus, *MCFL* not only reaffirmed the "explicit words of advocacy" approach which this Court had adopted in *Buckley*, but it did so in order to implement *Buckley's* underlying rationale: to protect *issue* advocacy by drawing a bright and impermeable line around *express* advocacy. Thus, issue advocacy could never be subject to restriction under § 441b as construed by *MCFL*.

C. The FEC has a history of attempting to restrict issue advocacy.

Despite this Court's solicitude for issue advocacy, the FEC has historically attempted to expand the scope of "express advocacy" thereby necessarily impinging on "issue advocacy." Ever since this Court's 1976 decision in *Buckley*, the agency has engaged in an effort aimed at modifying the holding that issue advocacy is constitutionally protected and that only speech which in express terms advocates the election or defeat of a clearly identified candidate may be regulated.[3] This effort has been repeatedly rebuffed by the lower federal judiciary.[4] In its

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[3] For a review of the history in this regard, *see* Fair Government Foundation, The FEC's Express War on Free Speech (1996).

[4] The cases holding that the "express advocacy" standard must be construed narrowly are numerous. *See, e.g., Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995) *aff'd per curiam*, 92 F. 3d 1178 (4th Cir. 1996); *Clifton v. Federal Election*

opinion in the instant case, the district court chronicled a portion of the FEC's effort as follows:

> In the context of corporate contributions or expenditures, the FEC was *unwilling to limit its enforcement activities to express advocacy* of the election or defeat of a particular candidate or candidates. Even after *Massachusetts Citizens for Life* held that such express advocacy was the limit on prohibited activity, the FEC refused to revise its regulations to fit this standard until this court explicitly held them to be illegal, the First Circuit affirmed, and the U.S. Supreme Court denied certiorari.

914 F.Supp. at 9; Pet. App. at 6 (emphasis added). As the Fourth Circuit recently summarized, the decision below

> is only the most recent in a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'express advocacy' and the permissible scope of the FEC's authority over corporate political speech.

Commission, 927 F. Supp. 493 (D.Me. 1996), *holding modified*, No. 96-1812, slip op. (1st Cir. June 6, 1997); *Federal Election Commission v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.), *aff'd in part and rev'd in part on alternate grounds* 65 F.3d 285 (2nd Cir. 1995); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1448 (D.Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996); *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991) *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) and *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979).

Federal Election Commission v. Christian Action Network, 110 F.3d 1049, 1055 (4th Cir. 1997) (*CAN II*).[5]

Throughout those cases, the FEC's position has consistently been that "explicit" or "express" words of advocacy are not required for a communication to constitute "express advocacy."[6] Indeed, in *CAN II*, the FEC "conced[ed] that the advertisement it claimed was "express advocacy" did "not employ 'explicit words,' 'express words,' or 'language' advocating the election or defeat of a particular candidate for public office." 110 F.3d at 1050. Rather, the FEC's position

> was (and is) that the determination of whether a given communication constitutes "express advocacy" depends upon all of the circumstances, internal and external to the communication, that could reasonably be considered to bear upon the recipient's interpretation of the message.

110 F.3d at 1056. Indeed, the FEC's position is embodied in the 11 C.F.R. § 100.22(b). As the *CAN II* court stated, "that portion of the FEC's new regulatory definition of 'express advocacy' " invalidated by the court below is, in substance, "the definition the FEC urged upon us." 110 F.3d at 1055.

The regulation at issue here, then, is essentially no different from the version of "express advocacy" which

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[5] *CAN II* involved the issue of whether the FEC was liable for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) for an unsuccessful enforcement action against the Christian Action Network. The United States Court of Appeals for the Fourth Circuit held that the FEC was liable for attorneys' fees because the FEC's position in the underlying litigation was "foreclosed by clear, well-established Supreme Court caselaw," and therefore, was not "substantially justified" within the meaning of 28 U.S.C. § 2412. 110 F.3d 1049, 1050.

[6] *See, generally,* cases cited above in footnote 4.

the FEC has advocated before the lower federal courts for two decades, and which those courts have repeatedly rejected. As *CAN II* recognized, the fact that this Court has "unambiguously limited the Federal Election Commission's authority over corporate expenditures to those for communications that use explicit words of advocacy has been uniformly recognized by the lower courts."[7] 110 F.3d at 1052.

D. The FEC has fashioned its regulatory definition of "expressly advocating" by eliminating an essential component of this Court's definition and substituting *dicta* from a court of appeals opinion.

It is apparent that subpart (a) of 11 C.F.R. § 100.22 originated in the examples of "express advocacy" contained in *Buckley's* footnote 52. 424 U.S. at 43. It is also apparent that subpart (b) originated in *dicta* contained in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *See MRLC*, 914 F.Supp. at 11; Pet. App. at 10. Indeed, the FEC concedes as much. *See* 60 Fed. Reg. 35,292 (1995).

Furgatch was an FEC enforcement action against an individual who, during the week prior to the 1980 presidential election, had placed a full-page advertisement in the *New York Times* and *The Boston Globe* criticizing President Carter's campaign. *Id.* at 858. Although Furgatch's advertisements exceeded the monetary thresholds which triggered FECA's disclosure provision (2 U.S.C. § 434(c)),

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[7] The FEC's history of attempting to broaden express advocacy presents a sharp contrast with Congress's response to *Buckley*, which was to comply with this Court's constitutional holding by adding the definition of "independent expenditures" to FECA and incorporating the term "expressly advocating" therein. *See* 2 U.S.C. § 431(17).

neither advertisement was reported to the FEC. *Id.* Moreover, the *Globe* advertisement omitted the disclaimer required by 2 U.S.C. § 441d. In part the advertisement read:

> The President of the United States continues degrading the electoral process and lessening the prestige of the office.
>
> * * *
>
> It is an attempt to hide his own record or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.
>
> DON'T LET HIM DO IT.

807 F.2d at 858. The FEC sued Furgatch under 2 U.S.C. §§ 434(c) and 441d. The district court dismissed and the FEC appealed to the Ninth Circuit. The issue before that court was whether Furgatch's advertisement constituted "express advocacy." The court held that it did and handed down a lengthy opinion explaining its holding. The opinion explained the court's view that in order to be considered express advocacy, speech must "when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." 807 F.2d at 864.

As the district court noted, *dicta* (such as the foregoing) extracted from *Furgatch* is the source for much of 11 C.F.R. § 100.22(b), the regulation at issue in this case. *See MRLC*, 914 F.Supp. at 11; Pet. App. at 10. As the *CAN II* court recognized, the "soft" or "broad[ ]" explanatory "observations were obviously *dicta*." 110 F.3d 1055 n.6. Because many of these *dicta* appeared to support the broad interpretation of "express advocacy" advocated by the FEC, the agency wished to preserve them for subsequent use. Therefore, the government vigorously

opposed Furgatch's petition for a writ of certiorari. In marked contrast to its position here, the FEC in *Furgatch* argued that a grant of certiorari was not proper, since the broad *Furgatch* language was not part of the holding. As the FEC recognized in 1987 (a position the FEC repudiates here), *Furgatch* was a mere application of the legal standard of "express advocacy" to a set of facts:

> The court of appeals' assessment of Mr. Furgatch's advertisement under that standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court. . . .

Furgatch, Brief for Respondent in Opposition at 7; Respondents' Appendix (Resp. App.) at 7. In arguing that *Furgatch* was limited to its facts, the FEC echoed the Ninth Circuit's statement about "express advocacy" determinations in general:

> Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions.

807 F.2d at 861. Thus, as the FEC was aware and as it argued in its Brief in Opposition to the Petition for Writ of Certiorari, the holding of the *Furgatch* court was based on the words in the communication itself, not on the *dicta* justifying the decision,[8] and thus, would carry little precedential weight.

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[8] As the *CAN II* court stated regarding the narrowness of the holding in *Furgatch*, the Ninth Circuit's "almost *exclusive* focus on 'speech' defined as the *literal words* or test of the communication, could not have been any clearer. . . . " 110 F.3d at 1053 (emphasis added).

1. The structure of the FEC's regulation.

The regulatory definition of "expressly advocating" in 11 C.F.R. § 100.22 is the product of a deliberate manipulation of judicial precedent by the FEC. The regulation was formed by splitting this Court's definition of "express advocacy" into two portions, then omitting one of those portions altogether and replacing it with *dicta* extracted from *Furgatch*.

The first half of the *Buckley* definition could be called, for convenience, the "definition proper." It is a dictionary-type definition. Under it, "express advocacy" means "explicit words of advocacy of election or defeat of a clearly identified candidate." 424 U.S. at 43. The second part of the definition could be called its "exemplary section," because in it this Court gave examples of "explicit words" which illustrated its definition.[9]

In fashioning its regulation defining "expressly advocating," however, the FEC has entirely omitted the "definition proper" and, instead, used examples of "explicit words" in subsection (a) of its definition. In subpart (b), it uses the amorphous standard patterned after *dicta* extracted from *Furgatch*, which rejects the "explicit words of advocacy" required by *Buckley* and *MCFL*.

REASONS FOR DENYING THE PETITION

For the reasons set forth below, this Court should deny the petition. This case is not of sufficient importance

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[9] This list of examples was contained in *Buckley's* footnote 52. 424 U.S. at 44 n.52. It is important to note that footnote 52 contained the *complete* definition of "express advocacy," both the "definition proper" ("express words of advocacy of election or defeat") and the "exemplary section" ('vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.').

to warrant this Court's attention; the decision below correctly applied this Court's precedents; and the decision below does not create a conflict among the courts of appeals.

I. THE DECISION BELOW WILL NOT IMPAIR THE EFFECTIVENESS OF THE NATION'S ELECTION LAWS.

The FEC argued that the "question presented by this case is important," because "the 'express advocacy' test fashioned by this Court in *Buckley* controls the operation of central aspects of FECA." Petition for a Writ of Certiorari (Pet.) at 15. The importance of the "express advocacy" test, however, must not be confused with the putative importance of granting review of the court of appeals' decision. For, contrary to the FEC's tacit assumption, the continued viability of the "express advocacy" test does not depend upon the continued viability of the FEC's regulation. The FEC states that "key provisions of the Act will be reduced to a futile vocabulary test" if "*as permitted by the decision below*, speakers can avoid express advocacy by eschewing a short list of 'magic words'. . . . " Pet. at 9 (emphasis added). But how can this be so?

The only issue before the court below was the validity of the definition of "expressly advocating" in a portion of an FEC regulation under the rule of *Buckley*. The court of appeals simply compared the regulation with the "express advocacy" standard in *Buckley*. In doing so, it found the regulation wanting. But the "express advocacy" test, as set forth by this Court in *Buckley* and re-affirmed in *MCFL*, is completely unaffected by the lower court's holding; it continues to be the law. Letting the decision below stand will impair only the use of the FEC's regulation – which is contrary to this

Court's "express advocacy" test – not the "express advocacy" test itself.

How, indeed, could a return to the regime of *Buckley's* express advocacy test "impair the effectiveness of the Nation's election laws"? Pet. at 9. How does the decision below 'permit' speakers to "avoid express advocacy by eschewing a short list of 'magic words' "? *Id.* Only if *Buckley's* test *itself* is a "magic words" test and, therefore, illegitimate. By equating the regulation (which contains only the FEC's *version* of the "express advocacy" test) with this Court's "express advocacy" test *itself*, the government makes *sub silentio* the specious claim that impairing the validity of the *regulation* will impair the validity of the nation's election laws. But the invalidation of a mere regulation cannot have such a sweeping effect. The only effect it could have is to return the election laws to the situation which existed before the regulation was promulgated. At that time, *Buckley's* "express advocacy" test was clearly the law and *MCFL* had applied the test to 2 U.S.C. § 441b. Corporations were free to make expenditures in connection with federal elections as long as they refrained from "express advocacy" as the *Buckley* Court had defined it. A return to that state of things can by no means be considered an "impairment" of the nation's election laws *unless Buckley itself is infirm.*

Thus, the FEC has attempted to transform the narrow issue of the validity of its regulation into a fundamental issue of constitutional law. As the FEC frames it, the issue, in actuality, is whether *Buckley's* rule itself is valid. Indeed, the FEC implies that *Buckley's* test is a mere 'magic words' test. *See* Pet. at 15. The FEC does not simply want this Court to review the validity of the FEC's regulation, it wants this Court to re-visit *Buckley's* express advocacy test and to re-cast it in the much broader mold which the FEC advocates.

In short, *Buckley's* "express advocacy" test was the law before this regulation was promulgated and will remain the law, whether or not this Court grants the instant petition. The court of appeals had neither the power nor the occasion to call into question the validity of *Buckley's* test. Nor does the FEC by regulation.

Because the instant case concerned the validity of a regulation rather than a statute, it does not foreclose the FEC from attempting to bring enforcement actions based on the various applicable provisions of FECA. The decision below did not limit the FEC's statutory enforcement powers. 2 U.S.C. §§ 437d, 437g. Therefore, despite the First Circuit's holding, the FEC remains free to attempt to enforce all provisions of FECA which have as a constituent element the "express advocacy" test. The FEC is only foreclosed from bringing enforcement actions based on that portion of the "express advocacy" definition contained in 11 C.F.R. § 100.22(b), which is contrary to this Court's construction of § 441b, the statutory authority for the FEC's regulation. This is hardly an impairment of the enforcement of the nation's election laws.

II. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S DECISIONS.

A. The court below correctly relied upon the actual language of *Buckley's* "express advocacy" test.

The fundamental issue before the court below was whether 11 C.F.R. § 100.22(b) conformed to the narrow, speech-protective "express advocacy" test set forth in *Buckley* and *MCFL*, or whether it would prohibit more speech than *Buckley* allows. In arriving at the conclusion that the regulation was invalid for overbreadth, the court of appeals substantially adopted the opinion of the district court. As the district court's opinion discloses, that

court adhered strictly to the "express advocacy" test in *Buckley*.

The district court's point of departure was that the "measuring standard" for its decision "is set by *Massachusetts Citizens for Life*." 914 F.Supp. at 10; Pet. App. at 9. In that case, "[this] Court held that it would limit the reach of the federal election statute . . . to a prohibition of express advocacy." *Id.* Pet. App. at 9. *MCFL*, the court continued,

> adopted *Buckley's* definition of "express advocacy," namely, "communications that include *explicit words of advocacy* of election or defeat of a candidate," "communications that *in express terms advocate* the election or defeat of a clearly identified candidate for federal office." According to *Buckley*, "[t]his construction would restrict the [statutory prohibition] to communications containing *express words of advocacy* of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'

914 F.Supp. at 10-11; Pet. App. at 10 (emphasis added). The above quotation discloses that the district court was thoroughly cognizant of the standard that must be applied. In particular, the district court recognized that this Court's "express advocacy" standard requires "explicit" or "express" words of advocacy. As noted above in footnote 1, the *Buckley* Court sets forth the standard in at least eight passages, and in each of them, insists upon "explicit" or "express" words.

Thus, in comparing the language of *Buckley's* "express advocacy" test to the language of 11 C.F.R. § 100.22(b), the court found the latter to be overbroad. 914 F.Supp. at 13; Pet. App. at 16. Not only does the regulation's plain language show it's overbreadth, the

FEC intended such overbreadth. The district court noted that

> [t]he Explanation and Justification issued on July 6, 1995, reveals that the FEC does intend subpart(b) to have just such breadth:
>
> Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.

914 F.Supp. at 13; Pet. App. at 15, *quoting* 60 Fed. Reg. 35,295 (1995). Thus, under *Buckley's* standard, the courts below had no choice but to invalidate the regulation because of its overbreadth.[10]

B. The decisions of the courts below implemented this Court's solicitude for the protection of political speech.

The decisions of the courts below were not made in a jurisprudential vacuum; rather, they specifically implemented this Court's understanding of the policies informing the First Amendment and the consequent solicitude for issue advocacy which is evident in *Buckley* and *MCFL*. As the district court stated, "the Supreme Court has been most concerned not to permit intrusion upon "issue" advocacy – discussion of the issues . . . or of the candidate's positions on . . . issues. . . . " 914 F.Supp. at 12; Pet. App. at 13. Therefore, this Court has drawn a "bright line that may err on the side of permitting things which affect

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[10] It is significant that the two subparts of the FEC's regulation are phrased disjunctively, and therefore, are independent of each other. Therefore, subpart (a) does not have a limiting or narrowing effect on the overbreadth of subpart (b).

the election process, but at all costs avoids restricting in any way, discussion of public issues." 914 F.Supp. at 12; Pet. App. at 13. Indeed, the policy behind the "express advocacy" test dictates that political speech be protected "in order to preserve the discussion of public issues *even at the risk that it is used to elect or defeat a candidate.*" 914 F.Supp. at 12; Pet. App. at 15 (emphasis added). This approach avoids the pitfall of chilling speech because "it permits a writer or speaker to know from the outset exactly what is permitted and what is prohibited." 914 F. Supp. at 12; Pet. App. at 14.

The foregoing quotations from the district court's opinion are entirely consonant with the principles which have been enunciated by this Court. One of the bedrock precepts of *Buckley* is that "[d]iscussion of public issues" is "integral" to our system of government. 424 U.S. at 14. The vice of the disclosure provision in that case was that it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. In order to prevent that evil, this Court allowed impingement of only those expenditures which "expressly advocate a particular election result." *Id.* at 80. The *Buckley* Court drew the line so as to err on the side of protecting speech, for "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45. Finally, this Court's express advocacy test avoids the deterrent effect of vague laws on "those who seek to exercise protected First Amendment rights" by "provid[ing] adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal. . . ." *Id.* at 76, 77.

C. The FEC is incorrect in labeling the decision below a "magic words" test.

The FEC attempts to impugn the decision below by caricaturing it as a "magic words" test. It is no such thing. The courts below did not hold that *Buckley* was limited to the exemplary words in footnote 52 or "their near perfect synonyms" as the FEC contends. Pet. at 12. In fact, the district court noted that Respondents did not object to subpart (a) of the regulation, the part which set forth several examples of express advocacy *which were not found in Buckley*. *MRLC*, 914 F.Supp. at 11; Pet. App. at 10. Thus, the FEC's emphasis on "magic words" is a red herring meant to distract this Court from the proper focus of the case, *i.e.*, the fact that subpart (b) lacks any requirement of "explicit words" of advocacy.

Indeed, the courts below were not called upon to interpret *Buckley*, but merely to say whether the FEC's regulation complied with *Buckley's* test. Therefore, the district court did not give an advisory opinion detailing how *Buckley* might affect a hypothetical regulation of the FEC. Rather, all the courts below were called on to do was to say how *Buckley's* test affected the *actual regulation* under consideration. This was an easy judgment to make because *the FEC's regulation by its terms is lacking in any requirement of "explicit" or "express" words of advocacy.* Subpart (b), which is phrased in the disjunctive and thus stands independently of subpart (a), has no requirement of "express" or "explicit" words. As the district court recognized, the FEC conceded that subpart (b) reached "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments." But such communications are classic "issue advocacy" under *Buckley*; for, as this Court made clear, "debate on the qualifications of candidates" are afforded "the broadest protection" under the First Amendment. 424 U.S. at 14.

D. The courts of appeals have uniformly followed *Buckley's* "express advocacy" test.

As explained above, the courts of appeals have uniformly held that "express advocacy" is a narrow, speech-protective judicial instrument. They have followed both the precise holding and the rationale underlying the "express advocacy" test. *See, e.g.*, cases cited above in footnote 4. The decision below accords with those cases. Furthermore, as the *CAN II* court recognized, even *Furgatch* can be reconciled with those decisions (and, by necessary implication, with the decision below) because its holding was narrow: "the court's analysis focused on the words of the advertisement at issue in the case. . . . " 110 F.3d at 1054. This is further confirmation that the court below correctly applied this Court's precedents.

III. THE DECISION BELOW DOES NOT CREATE A CONFLICT IN THE CIRCUITS.

A. The apparent conflict between holdings of several courts in *dicta* in one circuit court opinion does not constitute a conflict in the circuits.

The FEC is incorrect in claiming that the instant case has created a conflict between circuits. This contention is based solely on the alleged conflict between the First Circuit's decision in the instant case and the Ninth Circuit's opinion in *Furgatch*. But a difference between a holding in one circuit and *dicta* in another circuit does not create a circuit conflict. *Furgatch* was an FEC enforcement action under the disclosure and disclaimer provisions of FECA. The precise issue was whether specific advertisements placed by an individual violated those provisions, the determination of which depended on whether they constituted "express advocacy." The court held that they did. It was in the course of explaining that holding that the *Furgatch* court used in *dicta* much of the language

which the FEC later incorporated into 11 C.F.R. § 100.22(b). Indeed, in its brief in opposition to the petition for certiorari in *Furgatch*, the FEC was careful to distinguish between the holding of *Furgatch* and its reasoning:

> Petitioner makes no other arguments why the result reached in this case was erroneous, Rather, he takes issue with a number of the lower court's general statements regarding law and policy, taken out of their context in a lengthy and discursive opinion.

FEC's *Brief for Respondent in Opposition* in *Furgatch v. FEC;* at 10. As the FEC cogently noted, however, this Court "reviews judgments, not statements in opinions." *Id., quoting FCC v. Pacifica Foundation,* 438 U.S. 726, 734 (1978); Resp. App. at 10. Thus, *Furgatch* does not conflict with the decision below because *Furgatch* does not represent the judgment of a court of appeals that 11 C.F.R. § 100.22(b) is within the statutory authority of the FEC under § 441b and this Court's precedents. *Furgatch* is nothing more than an application of *Buckley's* express advocacy test to specific words in the context of an enforcement action. As the Ninth Circuit noted, however, the precedential value of such cases is limited:

> Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis,* offering limited guidance for subsequent decisions.

807 F.2d at 861.

Indeed, *Furgatch* is posited as the source of a "conflict" only because its *dicta* are the *source* of the regulation at issue here. Although it is evident that, in fashioning its regulation, the FEC employed language which had its origin in *Furgatch,* that is not enough to raise a conflict. There is no conflict precisely because *Furgatch* did not

judge the instant "express advocacy" regulation to be valid. Indeed, the Ninth Circuit has not had occasion to consider the validity of the FEC's express advocacy regulation.[11] Nor has any court of appeals other than the First Circuit reviewed it. Thus there is no circuit conflict; nor can there be a conflict until another court of appeals reviews this regulation and holds that it is within the authority of the FEC under 2 U.S.C. § 441b as construed by this Court in *MCFL*.

In sum, what the FEC has described in its petition is not a "conflict in the circuits," but rather, at most, an apparent conflict between the holdings of several circuit courts and the *dicta* in one circuit court opinion. This does not amount to a conflict in the circuits.

B. The decision below does not conflict with *Furgatch* because *Furgatch* concerned statutory provisions which impose a lighter burden on speech that the provision at issue here.

There is another very significant difference between *Furgatch* and the instant case which precludes any conflict. As noted, *Furgatch* was an FEC enforcement action under §§ 434(c) and 441d, the disclosure and disclaimer provisions of FECA. The instant regulation, on the other hand, was adopted under the purported authority of 2 U.S.C. § 441b which places a blanket prohibition on expenditures by corporations in connection with federal elections. It thus places a far heavier burden on speech than do the disclosure and disclaimer provisions at issue in *Furgatch*. Indeed, this Court has termed § 441b "more

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[11] Moreover, even if the Ninth Circuit were to consider the question of the validity of 11 C.F.R. § 100.22(b), it is by no means certain that it would hold the regulation to be valid since the court would not be bound by its previous *dicta*.

intrusive" than FECA's disclosure provisions. *MCFL*, 479 U.S. at 249. Nor was the difference in the burden lost on the *Furgatch* court. In fact, the Ninth Circuit specifically noted that the burden of disclosure requirements is minimal. Explaining that although "we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act," the court stated that "disclosure provisions" will "have only a 'reasonable and minimally restrictive' effect on the exercise of First Amendment rights." 807 F.2d at 862, *quoting Buckley*, 424 U.S. at 82.

In defining "express advocacy," then, the *Furgatch* court was careful to limit the applicability of the definition to the precise provision which it was construing. It was only because that statutory provision placed lighter burdens on speech, that the court was willing to fashion, in *dicta*, such a broad definition. Therefore, even if *Furgatch* could legitimately be read as expanding the scope of "express advocacy," that case nevertheless does not conflict with the decision below because its broader definition of that term is limited to less burdensome provisions of FECA and those provisions were not at issue below.

For these reasons, there is no conflict in the circuits.

CONCLUSION

For the foregoing reasons, this Court should deny the petition in this case.

Dated: June 16, 1997.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-108

HARVEY FURGATCH, PETITIONER

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is published at 807 F.2d 857 (9th Cir. 1987). The order of the court of appeals denying a petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 18a) and the order of the district court (Pet. App. 19a-21a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1987, and on April 23, 1987 that court denied Mr. Furgatch's petition for rehearing and suggestion for rehearing *en banc*. The Petition for a *Writ of Certiorari* was

filed on July 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reprinted in the Appendix to this brief.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-455 ("the Act") requires that all independent "communications expressly advocating the election or defeat of a clearly identified candidate" must "clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3). The Act also requires that anyone making "independent expenditures" (defined in 2 U.S.C. § 431(17) as an expenditure "expressly advocating the election or defeat of a clearly identified candidate") in excess of an aggregate of $250 in a calendar year must file a report with the Commission for public availability. 2 U.S.C. § 434(c).

One week prior to the 1980 general presidential election, Harvey Furgatch placed a full page advertisement in the *New York Times*. Captioned "Don't let him do it," the advertisement accused Jimmy Carter of "degrading the electoral process and lessening the prestige of the office" in a variety of ways. It then warned: "If he succeeds the

country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning. **Don't let him do it.**" (Pet. App. 22a).

Three days before the general election, Harvey Furgatch placed the same advertisement in the *Boston Globe*. Unlike the first advertisement, which stated that it was paid for by Harvey Furgatch and was "[n]ot authorized by any candidate," the second advertisement omitted the disclaimer that it was "not authorized by any candidate." The two advertisements cost Mr. Furgatch a total of approximately $25,000. (Pet. App. 3a).

Upon the foregoing facts, the Commission found probable cause to believe that Mr. Furgatch had violated 2 U.S.C. § 434(c) by failing to report his expenditures for these advertisements, and violated 2 U.S.C. § 441d by failing to include the disclaimer in the *Boston Globe* advertisement. When conciliation efforts proved unsuccessful, the Commission authorized the filing of this civil action pursuant to 2 U.S.C. § 437g(a)(6)(A).

B. The Decision Of The Court Below

Finding that, on the facts presented, "[r]easonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter" (Pet. App. 16a), the court of appeals concluded that "Furgatch was obligated to file the statement and make the disclosures required for any 'independent expenditure' under the

Federal Election Campaign Act" (Pet. App. 17a).[1] Explicitly acknowledging its obligation to "apply sections 434(c) and [441d] consistently with the constitutional requirements set out in *Buckley* [v. *Valeo*, 424 U.S. 1 (1976)]" (Pet. App. 7a), the court of appeals carefully measured the particular facts of this case against this Court's explanation of the "express advocacy" standard. The court observed that the determination in each case of whether a particular communication contains "express advocacy" is primarily a factual one (Pet. App. 9a), and concluded that the English language is too flexible a tool of communication to permit reducing this inquiry to a rigid formula that would be determinative in all cases (Pet. App. 12a-14a). Nevertheless, the court emphasized that the statute was narrowly limited to communications containing language "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. . . . [I]f any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements" (Pet. App. 14a-15a).

The court found that the language of Mr. Furgatch's advertisement left "no doubt that the ad asks the public to vote against Carter" (Pet. App. 15a).

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[1] The district court had dismissed the case, finding that "although it is a very close call, the political advertisements placed by defendant Furgatch do not, as required by 2 U.S.C. §§ 434(c) and 441d(a), constitute 'communications expressly advocating the election or defeat of a clearly identified candidate' " (Pet. App. 19a).

> The words we focus on are "don't let him." They are simply and direct. "Don't let him" is a command. The words "expressly advocate" action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act.
>
> . . . .
>
> Reasonable minds could not dispute that Furgatch's advertisement is urging readers to vote against Jimmy Carter. This was the only action open to those who would not "let him do it." The reader could not sue President Carter for his indelicate remarks, or arrest him for his transgressions. If Furgatch had been seeking impeachment, or some form of judicial or administrative action against Carter, his plea would have been to a different audience, in a different forum. If Jimmy Carter was degrading his office, as Furgatch claimed, the audience to whom the ad was directed must vote him out of that office. If Jimmy Carter was attempting to buy the election, or to win it by "hid[ing] his own record, or lack of it," as Furgatch suggested, the only way to not let him do it was to give the election to someone else. . . .
>
> . . . Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

(Pet. App. 16a-17a).

Finally, the court summarily rejected Mr. Furgatch's constitutional challenges to the statute on the ground "that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the

Supreme Court in that case was incorporated in the Act in its present form" (Pet. App. 17a).[2]

On April 23, 1987, the panel unanimously rejected Mr. Furgatch's petition for rehearing, and no judge of the Ninth Circuit requested a vote on his suggestion for rehearing *en banc* (Pet. App. 18a). Mr. Furgatch filed the Petition for *Writ of Certiorari* on July 20, 1987.[3]

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[2] Several months after the district court's decision in this case, Mr. Furgatch filed a separate suit seeking, pursuant to 2 U.S.C. § 437h, certification to the *en banc* court of appeals of the same constitutional arguments raised as affirmative defenses in this case. *Furgatch v. FEC*, No. 85-0720-N(M) (S.D. Cal. filed March 6, 1985). A different district court judge dismissed the second case for lack of case or controversy because of the outstanding judgment in this case that Mr. Furgatch's activities were not subject to the statute he was challenging. When the court of appeals reversed the decision in this case, it also vacated the dismissal in the second case which had been based upon that decision. In its order remanding the second case, however, the court noted that in this case it had already upheld the constitutionality of the Act as applied to Mr. Furgatch. Nevertheless, Mr. Furgatch again petitioned the district court to certify his constitutional challenges to the *en banc* court of appeals, and the district court denied that motion during a hearing on April 6, 1987. On April 30, 1987, Mr. Furgatch filed a petition with the *en banc* court of appeals, requesting a writ of mandamus ordering the district court to certify his constitutional challenges to the *en banc* court. *Furgatch v. USDC-CAS*, No. 87-7180 CIVATT (9th Cir. filed April 30, 1987). To date, no action has been taken on Mr. Furgatch's petition, and the Commission has not been requested to respond to it. *See* Fed. R. App. P. 21(b).

[3] Mr. Furgatch did not request a stay of mandate from the court of appeals and during a hearing on July 13, 1987, the district court denied Mr. Furgatch's motion to suspend further proceedings on remand pending resolution of his *certiorari* petition.

ARGUMENT

The decision below raises no significant issues of statutory construction or constitutional law that have not been dealt with by this Court before. This Court upheld the constitutionality of the predecessor of the reporting and disclosure requirements at issue here in *Buckley v. Valeo*, 424 U.S. 1, 80-81 (1976), and just last Term, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. 616, 623 (1986), the Court reaffirmed that the "express advocacy" standard contained in those provisions satisfies the First Amendment concerns relied upon by Petitioner. The court of appeals' assessment of Mr. Furgatch's advertisement under that standard turns upon the particular facts of this case, and thus does not necessarily indicate how courts will assess other communications in other circumstances. Such a fact-dependent determination does not warrant plenary review by this Court, particularly since this Court discussed the proper application of the express advocacy standard only last Term in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, and applied it in a manner consistent with that of the court of appeals in this case.

1. The court of appeals' finding that Mr. Furgatch's advertisements expressly advocated the defeat of Jimmy Carter in the imminent presidential election is amply supported by the record in this case. Indeed, the advertisements discussed nothing other than Jimmy Carter's reelection campaign. They accused Carter of labelling his opponents in the primary and general elections as unpatriotic, of attempting to use federal funds to buy special interest votes, of campaigning in a manner that

"cultivate[s] the fears, not the hopes, of the voting public," and of attempting "to hide his own record, or lack of it." These campaign tactics, the advertisements asserted, were "degrading the electoral process and lessening the prestige of the office." (Pet. App. 22a).

Petitioner asserts (Pet. 15) that mere criticism of how an election campaign is run does not amount to "express advocacy" under the Act. But that argument is inapposite here, for Mr. Furgatch's advertisements did not merely criticize Jimmy Carter's reelection campaign. Instead, they went on to warn that if Carter "succeeds, the country will be burdened with four more years of incoherencies, ineptness, and illusion," an unmistakable reference to Carter's election to another presidential term. This warning was followed immediately by the explicit exhortation, in bold print three lines high, **"Don't let him do it."** Plainly, the only way a reader could stop Carter from "succeed[ing]" in "burden[ing]" the country with "four more years" of his assertedly inadequate leadership was to defeat Carter in his bid for reelection.[4]

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[4] These facts demonstrate why the decision in *FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM")*, 616 F.2d 45 (2d Cir. 1980) (en banc), does not conflict with the decision here, as alleged by Petitioner (Pet. 16-17). The leaflet at issue in *CLITRIM* advocated lower taxes and listed a local congressman's votes on a certain tax bill, but it contained "no reference anywhere . . . to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambro." 616 F.2d at 53. The only exhortation in the leaflet in that case called for communication with the congressman on the issue of taxes, not

Petitioner argues (Pet. 17) that the court of appeals' decision conflicts with "the established rules of English grammar," but neither in his Petition to this Court nor in the court below has he ever specified any such "established rule" that conflicts with the result reached by the court of appeals. Petitioner argues (Pet. 17 n.14) that the advertisements actually called only for exposure of Carter's record. But far from being required by rules of grammar, this argument can only be made by ignoring the advertisement's explicit statement that if Carter "succeeds" in what it asks the reader to stop him from doing, "the country will be burdened with four more years" of Carter's leadership. While Carter's alleged hiding of his record is certainly one of the criticized campaign tactics that the advertisement accuses the reader of permitting Carter to pursue successfully, the cumulative success of all those criticized campaign tactics in obtaining "four more years" of Carter's presidency is what the advertisement exhorts the reader to prevent. This is confirmed by the advertisement's publication only three days before the election, when voting against Carter was the only action left to defeat Carter's reelection bid. As this Court explained in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623, "[t]he fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature."[5]

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action against him. Far from rejecting the Second Circuit's conclusion that this leaflet did not contain express advocacy of an election result, the court below explicitly agreed that *CLITRIM* involved only "issue-oriented speech" (Pet. App. 17a).

[5] Petitioner argues (Pet. 17-18) that *FEC v. Massachusetts Citizens for Life, Inc.* is inapposite here because that case

Petitioner makes no other arguments why the result reached in this case was erroneous. Rather, he takes issue with a number of the lower court's general statements regarding law and policy, taken out of their context in a lengthy and discursive opinion. It is well settled, however, that "[t]his Court . . . reviews judgments, not statements in opinions." *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), *quoting Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Since, as we have shown, the Ninth Circuit's finding that Mr. Furgatch's advertisements contained express advocacy is entirely consistent with this Court's precedents, Petitioner's disagreements with the Ninth Circuit's general discussion of express advocacy provide no basis for granting plenary review.[6]

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involved whether the supported candidates were clearly identified and "the statute's requirement that a candidate be 'clearly identified' invokes a different standard" than whether advocacy is express. But in *Buckley v. Valeo*, 424 U.S. at 43, this Court equated the two, stating that express advocacy requires "explicit words of advocacy of election or defeat of a candidate, much as the definition of 'clearly identified' . . . requires . . . an explicit and unambiguous reference to the candidate. . . . "

[6] Many of Petitioner's arguments simply misconstrue the court of appeals' views. For example, Petitioner asserts (Pet. 13) that " 'intent' appears to be the controlling and guiding factor in the opinion of the Court of Appeals," although the court of appeals dismissed this factor with the observation that "our attempts to fathom [Mr. Furgatch's] mental state would distract us unnecessarily from the speech itself" (Pet. App. 13a). Petitioner is also misguided in his attempt (Pet. 9-10) to equate the discussion of express advocacy in this case with the broader "clear advocacy" standard adopted by the court of appeals in *Buckley v. Valeo*, 519 F.2d 821, 853 (D.C. Cir. 1975), which was narrowed to express advocacy by this Court on appeal, 424 U.S. at 41-44. Initially, since Petitioner never made this argument

Petitioner's similar disagreements with statements and phrases taken out of context from the briefs filed below by the Commission's appellate attorneys (Pet. 4-5, 7-8, 17-18, 20) provide even less of a basis for granting review. Accordingly, these arguments need not be specifically addressed here.

Petitioner's attack (Pet. 16-19) upon the Commission's motives in bringing this case is completely unsupported by the evidence he cites.[7] The Commission's loss

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below, he is foreclosed from advancing it for the first time in this Court. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982); *EEOC v. FLRA*, 106 S. Ct. 1678, 1681 (1986). In any event, this Court rejected the court of appeals' "clear advocacy" standard in *Buckley* because it would have permitted speech designed only to advance issues associated with a candidate to be construed as promoting the candidate's election, thus putting the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley v. Valeo*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). The court of appeals in this case, by contrast, applied the narrower "express advocacy" standard in a manner that forecloses the possibility of varying inferences by limiting the reach of the statute to communications "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate" (Pet. App. 14a). This restatement of the express advocacy test avoids the pitfalls identified in *Buckley* and *Thomas* by ensuring that a communication plausibly subject to "varied understanding[s]" is excluded from the statute's reach.

[7] As an agency of the federal government, the Commission is entitled to a strong "presumption of honesty and integrity." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See also Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

of two cases[8] involving the express advocacy issue in the early aftermath of *Buckley v. Valeo*, 424 U.S. 1 (1976), hardly demonstrates the sort of concerted agency campaign to broaden the statute described by Petitioner. To the contrary, the Commission accepted both of those decisions without even an appeal, and has successfully endeavored to comply with them since. Indeed, there has been only one other report court case involving this issue in this decade, and this Court resolved the express advocacy issue in that case in the Commission's favor last Term. *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 623. Petitioner's allegations provide no reason for this Court to revisit this issue so soon.[9]

2. Petitioner also challenges the constitutionality of the reporting and disclosure provisions he violated on the

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[8] *FEC v. CLITRIM*, 616 F.2d 45 (2d Cir. 1980) (en banc); *FEC v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979).

[9] Petitioner asserts (Pet. 21) that this case discloses "at least four ways to construe [express advocacy]." As this brief demonstrates, the Commission has not disagreed with the court of appeals' application of the statute, and the Commission's briefs below were entirely consistent with the court of appeals' decision. Moreover, until now Petitioner has always insisted that he agreed fully with the district court's decision in this case. That reduces Petitioner's four approaches to two. But even the district court and the court of appeals were not really very far apart in their views of this case: both courts agreed that Mr. Furgatch's advertisements were so near the limit of the statute's coverage that the case was a "very close call" (Pet. App. 8a, *agreeing with* Pet. App. 19a). Thus, the "confusion of views among the professionals of the bench and bar" described by Petitioner (Pet. 21) is in reality only a narrowly differing assessment of the facts of this case.

basis of the First and Fifth Amendments (Pet. 21-23). Petitioner's First Amendment challenge is frivolous, for this Court upheld the constitutionality of the predecessors of these provisions, as applied to express advocacy, in *Buckley v. Valeo*, 424 U.S. at 80-81, and Congress specifically limited the coverage of the current provisions to express advocacy "to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976).

Petitioner argues that the reporting requirements violate his Fifth amendment right to equal protection because the institutional press is exempted from these provisions by 2 U.S.C. § 431(9)(B)(i).[10] This Court has repeatedly rejected such equal protection arguments, finding that with respect to campaign finance legislation it is appropriate to defer to the "judgment by Congress that . . . entities having differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981). *Accord, FEC v. National Right to Work Committee*, 459 U.S.

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[10] As Petitioner notes (Pet. 7, 23), he is requesting this Court to consider this contention in the first instance, since the court below did not address it beyond observing that this Court had previously upheld the constitutionality of these provisions (Pet. App. 17a). Petitioner's petition for rehearing to that court did not suggest further elaboration on this issue was necessary. *See* Fed. R. App. P. 40(a) ("The petition shall state with particularity the points of law or fact which . . . the court has overlooked. . . . ").

197, 210 (1982).[11] In particular, this Court noted in *Buckley* that special protections for the news media, like section 431(9)(B)(i), are "the rule, not the exception."

> Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media . . . and preferential postal rates and antitrust exemptions for newspapers.

424 U.S. at 93 n.127.

The institutional news media covered by section 431(9)(B)(i) are not, in fact, comparable to an individual purchasing an advertisement for political advocacy. Unlike an individual purchasing an advertisement, when a newspaper publishes an editorial the newspaper's financial sponsorship of the editorial is well understood, so that disclosure of the allocable operating costs is less crucial to the statutory goal of disclosing the constituencies of the candidate. *See Buckley v. Valeo*, 424 U.S. at 81. On the other hand, requiring a newspaper to report the portion of its daily operating costs allocable to editorial comments on federal elections would be far more burdensome than requiring an individual to report a discrete payment of an amount certain to purchase an advertisement.

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[11] *See also Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (summarily rejecting, *inter alia*, equal protection challenge to 2 U.S.C. § 431(9)(B)(i) which was set out in *Athens Lumber Co. v. FEC*, 689 F.2d 1006, 1015-16 (11th Cir. 1983), *appeal dismissed, cert. denied*, 465 U.S. 1092 (1984).

In any event, to the extent the Act treats Mr. Furgatch differently than the institutional press, the disparity tips decidedly in his favor. Most if not all of the institutional press are corporations which, as the Court noted in *California Medical Ass'n v. FEC*, 453 U.S. at 200-01, are subject to other, more stringent restrictions on their political activities than the reporting requirements of which Mr. Furgatch complains. Indeed, in *FEC v. Massachusetts Citizens for Life, Inc.*, 107 S. Ct. at 625-26, this Court explained at length how the Act's regulation of corporations is much more burdensome than the reporting requirements in 2 U.S.C. § 434. For example, while Mr. Furgatch is free to purchase advertising expressing his political choices in any newspaper in the country, so long as he reports his expenditures, a corporate newspaper is only permitted to run such an editorial in its own newspaper for distribution to its usual purchasers, and is entirely prohibited by 2 U.S.C. § 441b from expending its money to publicize its electoral views elsewhere. *See FEC v. Massachusets Citizens for Life, Inc.*, 107 S. Ct. at 624.[12] Thus, as in *California Medical Ass'n v. FEC*, 453 U.S. at 200 (emphasis in original), Petitioner's "claim of unfair treatment ignores the plain fact that the statute as a whole imposes far *fewer* restrictions on individuals and unincorporated associations than it does on corporations and unions."

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[12] "[T]he First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed. . . . " *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 n.14 (1985).

CONCLUSION

The petition for a *writ of certiorari* should be denied.

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